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2013 IL App (3d) 120330-U

Order filed October 28, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 9th Judicial Circuit,
Plaintiff-Appellee,) Knox County, Illinois,
)
v.) Appeal No. 3-12-0330
) Circuit No. 06-CF-519
MICHAEL WALKER,)
) Honorable
Defendant-Appellant.) Scott Shipplett,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition stated the gist of a constitutional claim.

¶ 2 Defendant, Michael Walker, pled guilty to aggravated battery (720 ILCS 5/12-4(b)(6) (West 2006)) and was sentenced to four years in prison. While incarcerated, defendant filed a *pro se* postconviction petition. The trial court dismissed defendant's petition as frivolous and patently without merit. Defendant appeals, arguing that the petition should not have been dismissed because it stated the gist of a constitutional claim. We reverse the trial court's dismissal and remand the

cause.

¶ 3

FACTS

¶ 4 On August 28, 2006, the State charged defendant with two counts of aggravated battery (720 ILCS 5/12-4(b)(6) (West 2006)). One year and two days later, on August 30, 2007, the public defender was appointed to represent defendant. At the time of the appointment, the trial court advised defense counsel that the indictment had been lost in the Knox County State's Attorney's Office with no good explanation for the long delay. Defense counsel made a demand for a jury trial but did not make a demand for a speedy trial.

¶ 5 On January 10, 2008, defendant pled guilty to one count of aggravated battery. In exchange, the State dismissed the second count of aggravated battery and agreed to a 4-year sentence. The sentence was set to run consecutively to a 20-year sentence defendant was already serving for murder. Defendant did not pursue a direct appeal.

¶ 6 On April 13, 2012, defendant filed a *pro se* postconviction petition. The petition alleged that his conviction should be vacated because his statutory right to a speedy trial was violated and because counsel was ineffective for failing to seek discharge of the case based on a speedy trial violation. Defendant's petition included a verifying affidavit that was signed but not notarized. After its review, the trial court issued a written order summarily dismissing the petition as frivolous and patently without merit. Defendant appeals.

¶ 7

ANALYSIS

¶ 8 Defendant argues that his postconviction petition stated the gist of a constitutional claim, and therefore should not have been dismissed. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing

Act (Act) provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2012). At the first stage, the trial court must independently determine whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345 (2010). A petition is frivolous or patently without merit if its allegations, when taken as true, fail to present the gist of a constitutional claim. *People v. Brooks*, 233 Ill. 2d 146 (2009). A trial court's dismissal of a postconviction petition as frivolous or patently without merit is reviewed *de novo*. *Morris*, 236 Ill. 2d 345.

¶ 9 Initially, the State argues that defendant's petition was properly dismissed because it did not contain the verification required by section 122-1(b) of the Act. 725 ILCS 5/122-1(b) (West 2012). It is undisputed that defendant's petition contained a verifying affidavit in conformity with the requirements of section 122-1(b); however, that affidavit, while it was signed, was not notarized. Despite the State's contention that it should have been notarized, we believe that the lack of notarization does not result in the dismissal of an otherwise meritorious petition. See *People v. Cage*, 2013 IL App (2d) 111264. Therefore, we will address the merits of defendant's petition.

¶ 10 In his postconviction petition, defendant's second argument was that counsel was ineffective for failing to seek discharge of the case based on his right to a speedy trial. In making the argument, defendant did not specify whether counsel should have argued a speedy trial violation based on statutory or constitutional grounds. Given the *pro se* nature of the pleading and the early stage in which it was dismissed, we can consider either ground. See *People v. Marquez*, 324 Ill. App. 3d 711 (2001).

¶ 11 With regard to the constitutional speedy trial right, we conclude that defendant's claim that counsel was ineffective for failing to file a motion to dismiss the case based on that right did state

the gist of a constitutional claim. In order to determine whether a defendant's constitutional right to a speedy trial was violated, courts must look at four factors: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). Generally, delays approaching one year are presumed to be prejudicial and trigger consideration of the four *Barker* factors. *People v. Donath*, 2013 IL App (3d) 120251. Here, the delay between the indictment and defendant's first appearance with counsel was over one year. Thus, if counsel had filed a motion to dismiss based on a speedy trial violation, the long delay would have triggered consideration of the *Barker* factors. Regardless of the outcome, this fact is enough to establish the gist of a constitutional claim. Therefore, defendant's postconviction petition should not have been dismissed at the first stage, and the entire petition should have gone forward. See *People v. Rivera*, 198 Ill. 2d 364 (2001) (where postconviction petition states a nonfrivolous claim, the entire petition should advance to the second stage of proceeding). We reverse the dismissal and remand the cause for further proceedings under the Act.

¶ 12

CONCLUSION

¶ 13 The judgment of the circuit court of Knox County is reversed, and the cause is remanded for further proceedings.

¶ 14 Reversed and remanded.